

This is an appeal by the respondent from the determination of the Special Administrative Law Judge (SALJ) that claimant sustained a 14.5 percent whole person functional impairment based upon an average of Drs. Pazell and Prostic's ratings.

Respondent requests review of the nature and extent of claimant's disability. Respondent argues that claimant is only entitled to a 4 percent permanent partial whole person functional impairment based on Dr. Prostic's rating.

Claimant argues she is entitled to a 25 percent permanent functional impairment based on Dr. Pazell's rating. In the alternative, claimant argues the SALJ's Award should be affirmed.

Because claimant returned to work for wages equal to or more than her average gross weekly wage at the time of her injury, the sole issue for Board determination is the nature and extent of her functional impairment.<sup>1</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Ronda McDonald began her employment as an apartment manager with respondent in 1999. While performing a job related trip on March 16, 2007, she was injured when her car was rear-ended by another vehicle. An ambulance was called and claimant was transported to St. Joseph's emergency room with complaints of back, neck, and hip pain. X-rays were negative for any broken bones. She was provided pain medications and released from the hospital the same day.

The accident occurred on a Friday and claimant returned to her regular job duties either the following Monday or within a day or two. Because she continued to experience pain, the respondent referred claimant to Concentra Medical Clinic where she was provided physical therapy. When she was released from treatment at Concentra, claimant felt she still needed medical treatment and apparently sought treatment on her own. She was provided additional physical therapy but discontinued that treatment because she felt it was too far to drive to attend the physical therapy sessions. And claimant testified that she last received medical treatment on May 15, 2007.

Claimant testified that she has gotten much better but still experiences problems with her lower back, right hip and sometimes her neck. She further testified she has problems walking and therefore needs to be able to stop and rest when her back and hip are causing pain. But claimant continues to perform her regular job duties working 40 hours per week. And she noted she has good days and bad days.

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<sup>1</sup> See K.S.A. 44-510e(a).

At claimant's attorney's request, Dr. Pazell examined and evaluated claimant on October 8, 2007. The doctor reviewed claimant's medical records and took her history. Dr. Pazell diagnosed claimant as having cervical and lumbar arthrosis. The doctor opined that claimant was not at maximum medical improvement and recommended that claimant obtain x-rays and an MRI of her lumbar spine as well as her cervical spine. If those studies should reveal abnormalities the doctor further noted claimant might be a candidate for epidural steroid injections. Finally, the doctor noted that if the injections did not provide relief claimant might be a candidate for surgery.

The claimant had x-rays taken of her left hip, pelvis and lumbar spine on October 22, 2007. Dr. Pazell met with claimant on December 21, 2007, and reviewed the x-rays. Dr. Pazell felt the x-rays showed osteoporosis in claimant's left hip. He further noted the x-rays of the lumbar spine showed evidence of osteoporosis and joint space narrowing at L4-5 and L5-S1. The doctor again recommended an MRI scan as well as a CT scan to check out the narrowing of the foramina.

However, by letter dated January 10, 2008, and based on the AMA *Guides*<sup>2</sup>, the doctor placed claimant into the DRE Thoracolumbar Category V for a 25 percent whole person impairment due to spondylolisthesis, right radiculopathy and lack of reflexes.

On cross-examination, Dr. Pazell agreed that claimant had provided a history of being asymptomatic, not having any complaints, most of the time. And Dr. Pazell agreed that when he saw claimant she did not complain of radiculopathy.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant at respondent's attorney's request. On May 19, 2008, Dr. Prostic took a history from claimant and performed a physical examination. Claimant's lumbar spine was tender at the right greater trochanter and right sacroiliac joint and she had pain with flexion and rotation of the right hip at 90 degrees of flexion. Dr. Prostic noted claimant did not have radiculopathy symptoms. Dr. Prostic ordered spine x-rays which revealed severe disk degeneration at L5-S1 and pseudospondylolisthesis at L4-5. Based upon the AMA *Guides*, Dr. Prostic opined claimant has a 4 percent permanent partial functional impairment to her body as a whole.

Dr. Prostic testified:

What was the basis of that impairment? I guess first, what was it?

A. It was 4 percent of the body as a whole.

Q. What was the basis of that 4 percent?

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<sup>2</sup>American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

A. I thought the radiologic evidence were all preexisting and what I thought may be new was some -- some of her loss of motion, so I thought that 4 percent was a fair approximation of what is new.

Q. Consistent with the guides?

A. Yes.<sup>3</sup>

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.<sup>4</sup> Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.<sup>5</sup>

As previously noted, work disability is not an issue in this case because claimant continues to work for respondent with no wage loss. Consequently, she is limited to an award based upon the percentage of her functional impairment.<sup>6</sup> Functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Both Drs. Pazell and Prostic expressed opinions on claimant's permanent functional impairment rating utilizing the *AMA Guides*. Dr. Pazell concluded claimant suffered a 25 percent functional impairment. Dr. Prostic concluded claimant suffered a 4 percent functional impairment.

Where there is a significant range between the percentage ratings offered by the medical experts the ALJ's frequently order an independent medical examination of claimant to assist in the determination of the percentage of functional impairment. That was not done in this case.

The claimant's continued complaints focused primarily on her low back and hip with occasional complaints of neck pain. Claimant had approximately two months of treatment and discontinued physical therapy. And claimant agreed that her condition had gotten

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<sup>3</sup> Prostic Depo. at 9-10.

<sup>4</sup> *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>5</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258, (1999).

<sup>6</sup> K.S.A. 44-510e(a).

much better with only occasional complaints of pain. Consequently, it is unclear why Dr. Pazell opted to rely upon the DRE Thoracolumbar category when claimant's complaints were either cervical or lumbar. Moreover, the doctor admitted claimant did not complain of radiculopathy and yet he used a finding of radiculopathy as well as loss of motion segment to justify his determination that claimant had a 25 percent functional impairment. Conversely, Dr. Prostic's examination of claimant failed to produce radiculopathy. Based upon a review of the entire evidentiary record including claimant's testimony regarding her condition and complaints the Board concludes that Dr. Prostic's rating, in this instance, is more persuasive than Dr. Pazell. Consequently, the Board finds claimant has met her burden of proof to establish that she suffers a 4 percent permanent partial whole person functional impairment.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated October 16, 2008, is modified to reflect that claimant suffered a 4 percent permanent partial whole person functional impairment as a result of her accidental injuries on March 16, 2007.

The claimant is entitled to 16.60 weeks of permanent partial disability compensation at the rate of \$373.35 per week or \$6,197.61 for a 4 percent permanent partial whole person functional disability, making a total award of \$6,197.61, which is ordered paid in one lump sum less amounts previously paid.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert G. Scott, Attorney for Claimant  
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier  
Jerry Shelor, Special Administrative Law Judge